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No. 07-1121

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IN THE
Supreme Court of the United States

LYNN JEWELL,
Petitioner,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review an issue that was not presented to or decided by the court of appeals, and as to which there is no circuit conflict justifying review, namely, whether an action challenging an ERISA plan administrator's termination of benefits under 29 U.S.C. § 1132(a)(1)(B) requires a "plenary proceeding."

RULE 29.6 STATEMENT

Respondent Life Insurance Company of North America is a wholly owned subsidiary of Connecticut General Corporation, which is a wholly owned subsidiary of CIGNA Holdings, Inc., which is a wholly owned subsidiary of CIGNA Corporation. CIGNA Corporation is the only publicly traded entity among this group of affiliated companies.

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INTRODUCTION

This is an unremarkable case under Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), which authorizes a federal civil action "to recover benefits due . . . under the terms" of an ERISA-governed employee benefit plan. Petitioner Lynn Jewell challenged the termination of long-term disability benefits by Respondent Life Insurance Company of North America ("LINA"). Applying settled principles of law to the specific facts of this case, a unanimous panel of the Tenth Circuit concluded that the district court abused its discretion by allowing Jewell to supplement the evidentiary record considered by LINA with two physicians' letters and Jewell's own affidavit. The letters and affidavit were generated years after LINA's benefits determinations, and did not meet the Tenth Circuit's established standards for the introduction of extra-record evidence in Section 1132(a)(1)(B) cases. The Tenth Circuit remanded the case for further proceedings based on the trial court's consideration of the unsupplemented record.

Jewell asks this Court to rule that Section 1132(a)(1)(B) automatically entitles every ERISA claimant to a "plenary proceeding," rather than a review of the materials presented to and considered by the plan administrator, as supplemented by additional evidence where appropriate. Jewell never previously raised the question he asks this Court to decide, and as a result the Tenth Circuit did not address the issue. Also, there is no circuit conflict. In fact, the Seventh Circuit applies precisely the

same rule as the Tenth Circuit did in this case. Nor is any other Circuit in conflict on the question Jewell seeks to have considered. Thus, there is no reason to grant the petition for certiorari.

STATEMENT OF THE CASE

I. Factual Background.

In April 1997, one year after Jewell began working for Sprint Telecommunications Venture, he claimed that he was unable to work and sought disability benefits. Jewell described himself as "[d]epressed" and stated that he had been treated for depression for a number of years. Pet. App. 2a-3a. LINA, which underwrote and administered the benefits plan, investigated Jewell's claim. The available medical information, including an independent medical examination that LINA requested, confirmed a diagnosis of depression and anxiety. LINA approved short-term and, later, long-term disability benefits. *Id.* at 3a. LINA advised Jewell that it was paying long-term disability benefits subject to the plan's mental illness provision, which limited such benefits to 24 months' duration if mental illness caused or contributed to the disability. *Id.*

Before his long-term benefits would have expired under the mental illness limitation, LINA invited Jewell to provide any additional information demonstrating that his condition was caused solely by an "organic" (i.e., physical) disability. Jewell replied that he had no other information to submit. He did not challenge application of the mental illness limitation at any time during the 24 months he

received long-term benefits, from October 1998 through October 2000, or during the next two years. *Id.*

Jewell requested reconsideration of LINA's benefits determination in August 2002, "around the time his wife abandoned him" and withdrew her financial support, and a few months after his involvement in a serious motorcycle accident. *Id.*; Appellant's 10th Cir. Opening Br. at 26 (citing Tenth Circuit Appendix ("10th App.") 178). For the first time in over four years, he claimed that his original disability was caused by an organic brain injury, not mental illness (including depression). Pet. App. 3a. Thus, he sought retroactive reinstatement of long-term benefits, unconstrained by the 24-month mental illness limitation. To obtain such benefits under the plan, Jewell was required to establish not only that mental illness did not contribute to his disability, but also that his alleged organic injury arose some time prior to October 2000, when his coverage expired.

After reviewing Jewell's reconsideration request, including the additional medical information he provided, LINA declined to authorize further benefits. LINA noted that Jewell's own treating physicians and mental health professionals continued uniformly to conclude that mental illness had caused or contributed to his disability, and that there was no medical evidence of an organic brain injury, much less one that existed prior to October 2000. Nevertheless, LINA invited Jewell to provide any other available medical documentation. Nine months later, Jewell submitted a second appeal

along with limited additional information. *Id.* Based on all the medical reports and other records before it, LINA again concluded that Jewell's inability to work stemmed from mental illness, not an organic brain injury. *Id.* Jewell then filed suit.

II. Proceedings Below.

After removal of Jewell's state court action to federal court, the case proceeded as a claim under Section 1132(a)(1)(B). Pet. App. 4a. The Sprint plan did not grant LINA discretion to determine eligibility for benefits, and LINA therefore acknowledged that its benefits determination was subject to de novo review under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

After discovery, LINA moved for judgment on the record developed during its extensive claims administration process. Pet. App. 4a. Jewell did not object to this procedure, but he did ask permission to "augment the record" with expert testimony under the guidelines set forth in *Hall v. UNUM Life Insurance Co. of America*, 300 F.3d 1197 (10th Cir. 2002). Pet. App. 4a; *see also* 10th App. 586 ("[D]iscovery should be completed and Plaintiff [should be] allowed to supplement the record pursuant to *Hall* prior to the ruling on this matter."). *Hall* gives district courts discretion to supplement the administrative record when such supplementation is necessary to conduct an adequate de novo review under Section 1132(a)(1)(B). 300 F.3d at 1202-03.

The district court reserved ruling on Jewell's request to supplement the record, pending Jewell's

submission of affidavits outlining the additional evidence he sought to introduce. Pet. App. 4a. Jewell later provided (as relevant here) letters from two physicians and his own affidavit. LINA objected to the new evidence as not meeting the *Hall* standards. In a December 2005 order, the district court decided to admit the evidence, and set a hearing to decide LINA's motion for judgment. The order stated that there would "not be an evidentiary hearing" and that the court's review would be "limited to the parties' briefs, the attorneys' arguments, and the administrative record and supplements thereto which the Court has allowed in this Order." 10th App. 787-88.

Jewell did not object to or request reconsideration of the December 2005 order; nor did he request an evidentiary hearing or trial. Rather, Jewell agreed that *Hall* would control the district court's decision on whether to supplement the record, and he did not proffer evidence beyond the already accepted letters and affidavit. After argument in March 2006, the district court concluded that Jewell was entitled to long-term disability benefits, based almost exclusively on the two supplementary doctors' letters, which the court treated as unrebutted expert testimony. Pet. App. 5a.

LINA appealed, arguing that under *Hall* the district court's consideration of Jewell's extra-record evidence was an abuse of discretion, and that even the new evidence confirmed the applicability of the mental health limit. In response, Jewell contended that the district court properly exercised its discretion under *Hall*. Jewell never contended that

Hall stated too narrow a rule for admission of evidence; nor did he suggest that the district court should have applied any other standard of admissibility, much less that the Due Process Clause required a broader standard.

In a unanimous opinion authored by Judge McConnell, the Tenth Circuit applied *Hall* – as all parties had agreed that it should – and concluded that the district court had abused its discretion in allowing Jewell to supplement the record. *Id.* at 1a-29a. At the outset, the court confirmed the important policy reasons, as previously outlined in *Hall*, for limiting de novo review to the administrative record except where circumstances warrant presentation of additional evidence. Such a limitation prevents federal courts from functioning as "substitute plan administrators"; "encourage[s] the parties to develop the factual record as fully and as early as possible"; "may avert problems related to the loss or staleness of evidence"; "makes it easier for the plan administrator to come to an objectively correct, well-supported determination"; and "decreases both the likelihood of subsequent federal litigation and the costs that would be attendant thereto." *Id.* at 6a-7a. Ultimately, the Tenth Circuit recognized that "a fully developed administrative record facilitates 'the goal of prompt resolution of claims by the fiduciary under the ERISA scheme,'" and "if litigation should ensue, . . . deters the practice of holding back evidence for presentation to the district court as a fallback or a 'surprise.'" *Id.* at 7a-8a (citation omitted).

Against this backdrop, the court of appeals concluded that under *Hall* the district court should not have accepted and considered Jewell's post hoc submissions. Those submissions provided no assistance in resolving any medical complexities or credibility issues; the information could have been provided earlier, when LINA made its benefits determination or during the administrative appeal process; and large portions of the letters were cumulative of documentation already before the plan administrator. *Id.* at 15a-27a. Therefore, the court remanded the case to the district court for a determination on the merits, based on a de novo review of the unsupplemented administrative record. *Id.* at 28a-29a.

REASONS FOR DENYING THE PETITION

Contrary to Jewell's contention, this case does not present the issue raised in his petition, i.e., whether "a civil action authorized by ERISA § 502(a)(1)(B) is a plenary proceeding governed by the Federal Rules of Civil Procedure or limited to a review of a claim record as a court would decide an administrative law claim." Pet. 4. And even if it did, there is nothing in the Tenth Circuit's decision – which is consistent with the decisions of other Circuits, as well as with this Court's precedent and with ERISA itself – that merits this Court's review.

Indeed, most of Jewell's arguments reflect a fundamental confusion between two distinct issues: the appropriate standard of review in a Section 1132(a)(1)(B) case, and the scope of the record to be considered in applying that standard of review. The

former question is not at issue in this case. All parties have agreed, and the Tenth Circuit properly held, that – pursuant to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) – the standard of review of the plan administrator's decision is de novo. But the question of whether de novo review should be carried out on a closed record (as is the case with, for instance, court of appeals review of a district court's summary judgment decision), or on a record that has been partially or fully opened for submission of further evidence, is an entirely separate one. As to that latter question, the Tenth Circuit's approach, which in Section 1132(a)(1)(B) cases involving de novo review affords the trial court discretion to add to the record that was before the plan administrator, is wholly unexceptional.

I. The Question Presented In The Petition Was Not Raised Or Passed On Below, And Is In Any Event Not Squarely Presented On Interlocutory Review.

1. Certiorari should be denied because Jewell asks this Court to review a question he did not raise, and that was not passed upon, below. *See Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169-70 (2004); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

On appeal, Jewell argued only that the district court properly applied the Tenth Circuit's decision in *Hall v. UNUM Life Insurance Co. of America*, 300

F.3d 1197 (10th Cir. 2002) – a case he does not mention in his petition – and did not abuse its discretion in supplementing the administrative record. Jewell acknowledged below that *Hall* "sets out circumstances where the trial court may admit additional evidence that would be of assistance in the de novo review of the benefits decision," and contended that "the district court followed the guidelines set forth in *Hall*." Appellee's 10th Cir. Answer Br. and Opening Cross-Appeal Br. at 14; *see also id.* at 15, 23-34.

Jewell never raised any of the arguments contained in his petition. He did not contend that *Hall* was inapplicable, or wrongly decided because it set forth too restrictive a standard for admitting evidence in de novo review proceedings. He did not suggest that he was entitled to consideration of his supplemental evidence, or to some broader "plenary proceeding," without regard to the guidelines that *Hall* established. And he did not contend that Section 1132(a)(1)(B) of ERISA, this Court's decisions, or due process principles independently mandated affirmance of the district court's decision to admit the supplemental evidence.

Because Jewell did not question *Hall*, the Tenth Circuit did not address whether Section 1132(a)(1)(B) claimants are always entitled to a plenary proceeding in which they can introduce evidence that was not before the plan administrator. Instead, the Tenth Circuit straightforwardly applied *Hall* to the facts of this case. Its decision hardly stands for the proposition that review is always limited to the plan administrator's record, or that

review is to be conducted as if the case involved review of an administrative agency's decision, as Jewell suggests. Pet. 4, 8. On the contrary, after a detailed review of Jewell's tendered extra-record documents, the Tenth Circuit held only that on the facts of this particular case, the admission of the new evidence was not warranted. Pet. App. 10a-27a. The court made clear that district courts must make such discretionary determinations on a case-by-case basis. *Id.* at 8a-10a. And the Tenth Circuit remanded for de novo review of the plan administrator's determination based on the evidence that was before the administrator.[1]

2. This waiver is sufficient reason to deny the petition. But Jewell's challenge is not squarely presented in any event. Given the Tenth Circuit's disposition of the appeal, it remains to be seen whether the admission of supplemental evidence would make any difference to the outcome of Jewell's case. When the district court conducts its de novo review on remand, it may find (although, in LINA's view, it should not) that the record that was before the plan administrator shows that Jewell is entitled to the further benefits he seeks. Thus, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 327-28 (1967); *see also, e.g., Hamilton-*

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[1] Notably, Jewell did not seek panel rehearing or rehearing en banc, even though the en banc court would have had the power to overrule the prior panel decision in *Hall*. *See Burlington N. & Santa Fe Ry. Co. v. Burton*, 270 F.3d 942, 947 (10th Cir. 2001).

Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree.").

II. There Is No Circuit Split Justifying This Court's Review.

In all events, the purported circuit conflict identified in Jewell's petition does not exist.

According to Jewell, the decision below is in "direct conflict" with the approach taken by the Seventh Circuit – a proposition for which Jewell cites *Diaz v. Prudential Insurance Co.*, 499 F.3d 640 (7th Cir. 2007). Pet. 8. That argument is misleading at best. *Diaz* does not address the question of the proper scope of the record on de novo review in a Section 1132(a)(1)(B) case. It merely explains that no deference is due a plan administrator's judgment in a case applying the de novo standard. *See* 499 F.3d at 643. But the Seventh Circuit has made crystal clear – in a decision cited in *Diaz* – that it takes exactly the same approach as the Tenth Circuit with respect to the scope of the record in such cases.

In *Patton v. MFS/Sun Life Financial Distributors, Inc.*, 480 F.3d 478 (7th Cir. 2007), *cited in Diaz*, 499 F.3d at 643, the court of appeals held that in conducting de novo review "the district court had discretion to limit the evidence to the record before the plan administrator, or . . . [to] permit the introduction of additional evidence necessary to enable it to make an informed and independent judgment," and reviewed the district court's exclusion of additional evidence for abuse of discretion. 480 F.3d at 490 (internal quotation

marks omitted); *see also Casey v. Uddeholm Corp.*, 32 F.3d 1094, 1099 (7th Cir. 1994). The Seventh Circuit specifically noted that it was applying the *same standard* that the Tenth Circuit applied in *Hall* – which is, of course, the very standard applied in the decision at issue here. 480 F.3d at 491. In light of *Patton*, Jewell's claim of a conflict with the Seventh Circuit is mystifying.

Jewell's claim of a conflict with the Eleventh Circuit, for which he relies on *Moon v. American Home Assurance Co.*, 888 F.2d 86 (11th Cir. 1989), is similarly misplaced. In *Moon*, the court stated in passing that "American Home's contention that a court conducting a de novo review must examine only such facts as were available to the plan administrator at the time of the benefits denial is contrary to the concept of a de novo review." *Id.* at 89. But the court did not address whether a party is entitled to a "plenary proceeding" in connection with a de novo review of a benefits determination, as Jewell claims he is, or under what circumstances a district court should consider evidence beyond what is contained in the administrator's record. Moreover, the dispute in *Moon* did not relate to the existence of a disability at a particular point in time; it related to whether the claimant's decedent was indeed an "officer" of his company and whether he had in fact been traveling on business when he was killed in a plane crash. *Id.* at 87. That type of "extrinsic matter" may not be found in a plan administrator's record, *see Orndorf v. Paul Revere Life Ins. Co.*, 404 F.3d 510, 519-20 (1st Cir. 2005), and therefore might

well be properly admitted by a district court exercising the kind of discretion that *Hall* affords.

Even if *Moon* were in some tension with the Tenth Circuit's decision (and it is not), it is not indicative of any widespread problem. Every other court of appeals to have addressed the issue – all subsequent to the 1989 decision in *Moon* – has taken an approach that is fully consistent with the Tenth Circuit's. *See, e.g., Orndorf*, 404 F.3d at 519-20 ("[T]he fact that judicial review is de novo does not itself entitle a claimant to a trial or to put on new evidence. . . . The focus of the review under de novo review is still the administrator's decision and must ordinarily be based on the administrative record. There may be times when it is appropriate for courts to hear new evidence."); *Krizek v. Cigna Group Ins.*, 345 F.3d 91, 98 (2d Cir. 2003) (court should not exercise its discretion to allow supplemental evidence unless claimant can demonstrate good cause); *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176, 1184-85 (3d Cir. 1991) (noting that "[i]f the record on review is sufficiently developed, the district court may, in its discretion, merely conduct a de novo review of the record of the administrator's decision"); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1025 (4th Cir. 1993) ("The district court should exercise its discretion [to receive additional evidence] only when circumstances clearly establish that additional evidence is necessary to conduct an adequate review of the benefit decision."); *Brown v. Seitz Foods, Inc.*, 140 F.3d 1198, 1200 (8th Cir. 1998) (discouraging admission of supplemental evidence in order to

"ensure expeditious judicial review of ERISA benefit decisions and to keep district courts from becoming substitute plan administrators," but allowing such evidence where necessary for adequate de novo review (internal quotation marks omitted)).[2]

Accordingly, there is no circuit conflict justifying review. Any relevant disagreement between the Eleventh Circuit and the Tenth is "more apparent than real," *Bunting v. Mellen*, 541 U.S. 1019, 1021-22 (2004) – and the Eleventh Circuit decision is nothing more than an aging outlier. This Court should therefore deny the petition, as it has previously done in cases alleging the same conflict that Jewell has alleged here. *See, e.g., Orndorf v. Paul Revere Life Ins. Co.*, 546 U.S. 937 (U.S. Oct 11, 2005) (No. 05-189).

III. The Decision Below Is Fully Consistent With ERISA And This Court's Precedent.

The Tenth Circuit's *Hall* rule is consistent with ERISA's framework and animating policies, as well as with this Court's ERISA precedents. Although

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[2] *See also, e.g., Vega v. Nat'l Life Ins. Servs. Inc.*, 188 F.3d 287, 299 (5th Cir. 1999) (when conducting de novo review, the district court is generally "constrained to the evidence before the plan administrator" with certain exceptions, such as evidence related to interpreting the plan or explaining medical terms and procedures); *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990) (holding that, with certain exceptions, "the de novo review required by *[Firestone v.] Bruch* is a de novo review of the record before the administrator"); *Mongeluzo v. Baxter Travenol Long Term Disability Ben. Plan*, 46 F.3d 938, 943-44 (9th Cir. 1995) (holding that supplemental evidence is admissible if necessary to conduct an adequate de novo review).

Jewell contends that a plenary proceeding is required here because federal-court review is de novo and takes place in the context of a "civil action," 29 U.S.C. § 1132, these arguments founder on the well-established principle that the scope of proper evidentiary consideration is a function of congressional purpose regarding the statute at issue.

The *Hall* rule is a sensible implementation of ERISA, which makes plan administrators the primary arbiters of employee benefits claims, and then provides an avenue by which employees may obtain judicial review of benefits determinations. *See generally* 29 U.S.C. §§ 1132, 1133. The statute ensures that federal courts have a record on which to review benefits determinations by requiring plan administrators to provide employees a "reasonable opportunity" to argue their entitlement to benefits, "a full and fair review by the appropriate named fiduciary of the decision denying the claim" based on any relevant evidence the employee wishes to submit, and adequate notice of the reasons for claim denial. *Id.* § 1133; *see also* 29 C.F.R. § 2560.503-1(b).

Employees denied benefits can then file suit in order to obtain federal court review of the administrator's decision. 29 U.S.C. § 1132(a)(1)(B); *Firestone*, 489 U.S. at 105; *see also, e.g., id.* at 108, 109, 115. *Firestone* makes clear that courts considering actions under Section 1132(a)(1)(B) do not write on a blank slate: they are reviewing a plan administrator's decision, either under a de novo or an arbitrary and capricious standard of review. *See id.* at 115.

Because ERISA itself does not expressly define what evidence district courts may consider when they review a plan administrator's decision de novo, the courts may determine that question – like the standard of review – in light of congressional purposes. *See id.* at 110 (developing standard of review as matter of federal common law after examining congressional purposes). *Firestone* did not explicitly address the scope-of-evidence question. In *Hall*, the Tenth Circuit held that "the best way to implement ERISA's purposes . . . is to allow the district court to supplement [the administrative] record when . . . additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision." 300 F.3d at 1202 (internal quotation marks omitted). That rule is consistent with ERISA's framework: it recognizes that the employee has had the opportunity to enter favorable evidence into the record during the primary claim proceeding before the plan administrator, but allows the district court to admit new evidence in order to ensure meaningful and effective review.

The rule is also consistent with the congressional purposes behind the ERISA statutory scheme. In addition to establishing fair benefits determination procedures, Congress's purposes included "promot[ing] the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), while containing litigation expenses and administrative costs, *see Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). The *Hall* rule helps keep litigation costs down by "promot[ing] the internal resolution of

claims": employees will be more likely to present all of their evidence to administrators, allowing a more accurate and final determination, if they know that the reviewing court will not necessarily permit new evidence. *Quesinberry*, 987 F.2d at 1022 (internal quotation marks omitted); *see also* Pet. App. 7a-8a. Fostering the plan administrators' ability to be the primary decisionmakers furthers "prompt and fair claims settlement," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), and prevents the federal courts from becoming overburdened as "substitute plan administrators," *Quesinberry*, 987 F.2d at 1025; *see also Perry*, 900 F.2d at 966. In sum, the *Hall* rule is consistent with ERISA and with relevant Supreme Court precedent.[3]

Jewell's contrary arguments are misplaced. First, Jewell blurs the distinction between the standard of review and the rules regarding what evidence the court may consider as part of that review. But de novo review need not go hand-in-hand with plenary evidentiary consideration. *See United States v. Raddatz*, 447 U.S. 667, 673-74 (1980) (distinguishing between de novo review of the record below and a de novo *hearing* that would involve new evidence). Indeed, in construing other statutes providing for de novo review, this Court has looked to congressional intent and concluded that de novo review would

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[3] This Court's long-standing recognition that ERISA is intended to promote more streamlined benefits procedures defeats Jewell's argument that the only evidence of congressional intent to this effect comes from a Senate Report pertaining to an earlier version of the statute. *See* Pet. 16-17.

entail judicial discretion to admit new evidence, but no obligation to do so. *See, e.g., id.*

Because a de novo standard of review does not mandate a plenary proceeding, the cases on which Jewell relies that concern the standard of review of an administrative decision are inapposite. For instance, *United States v. First City National Bank*, 386 U.S. 361 (1967), *quoted in* Pet. 12, did not address the scope of the evidentiary record. Instead, the Court analyzed the *standard of review* under the Bank Merger Act of 1966, which stated that the "issues presented" were to be examined "de novo." 386 U.S. at 368. Although Jewell relies on the Court's remark that deference to an agency's determination was inappropriate, that passage concerned only the difficulty of deferring to the agency in the absence of any administrative record. *See id.*

Second, Jewell contends that because Section 1132(a)(1)(B) authorizes employees whose benefits have been denied to file a "civil action" to "recover benefits due," he must be entitled to a plenary proceeding. That argument is also mistaken. The label "civil action" does not automatically guarantee a right to present new evidence. Numerous statutes grant the right to file a "civil action" to review an administrative decision, while limiting the proceeding to review of a record or committing the scope of evidence to the court's discretion. *See, e.g.*, 47 U.S.C. § 332(c)(7)(B) (allowing civil "action" to be filed in district court, but providing for "substantial evidence" review on a "written record"); *Roxanne J. v. Nevada County Human Servs. Agency*, 2006 WL

3437494 (E.D. Cal. 2006) (Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, permits "civil action" to review administrative determination, and allows introduction of some new evidence). Thus, the scope of the evidentiary record in a "civil action" is simply a function of congressional policies with respect to the statutory scheme at issue – and, as noted above, the *Hall* common-law rule implements this Court's established understanding of ERISA's purposes.[4]

The cases Jewell cites in support of his argument that a "civil action" must include an opportunity to present new evidence are irrelevant, as they concern statutes other than ERISA. Jewell primarily relies on *Chandler v. Roudebush*, 425 U.S. 840 (1976), in which the Court held that federal employees are entitled to a plenary trial under Title VII. Although the review mechanism was, like here, a "civil action," the Court's holding was based on the fact that, unlike Section 1132(a)(1)(B), Title VII expressly contemplates a *trial* proceeding. *Chandler*, 425 U.S. at 845 (quoting Title VII's requirement that the action be expeditiously scheduled "for trial"). Beyond the statutory language, the legislative history of Title VII "confirms that Congress intended to accord

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[4] For this reason, Jewell's related argument that the Tenth Circuit decision contemplates a procedure "outside the bounds of the Federal Rules of Civil Procedure," Pet. 15, is also meritless. *See, e.g., Capistrano Unified School Dist. v. Wartenberg By and Through Wartenberg*, 59 F.3d 884, 892 (9th Cir. 1995) (de novo review with discretionary admission of new evidence was "what Congress intended under [IDEA] . . . even though it does not fit well into any pigeonhole of the Federal Rules of Civil Procedure").

federal employees the same right to a trial de novo as is enjoyed by private-sector employees." *Id.* at 848. There is no comparable evidence of congressional intent with respect to Section 1132(a)(1)(B).[5]

Similarly, Jewell's reliance on the jury trial required by *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990), misses the mark, because that case concerned a federal common law breach-of-representation claim under Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"). Aside from the fact that the action challenged the union's conduct rather than seeking review of its determinations, this Court has specifically eschewed "the *wholesale* importation" of LMRA standards into ERISA. *Firestone*, 489 U.S. at 109 (emphasis in original).

IV. The Decision Below Is Fully Consistent With Due Process Principles.

Jewell next argues that due process principles require that employees be entitled to introduce new evidence at will in de novo actions under Section 1132(a)(1)(B). All of his contentions founder on the fact that ERISA and its regulations provide extensive procedural protections that govern the

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[5] Jewell makes too much of a footnote in *Chandler* regarding indications of Congress's intention to confine review to the administrative record. 425 U.S. at 862 n.37, *quoted in* Pet. 11-12. Even if such a clear-statement rule existed, it would have little application where, as here, Congress has left many aspects of the civil action – even the standard of review – to be developed by courts as a matter of federal common law. *See Firestone*, 489 U.S. at 110; *King v. Hartford Life & Acc. Ins. Co.*, 414 F.3d 994, 998 (8th Cir. 2005).

plan administrator's benefits determination. Moreover, to the extent that an employee is denied the opportunity to present material evidence to the plan administrator, the *Hall* rule affords district courts discretion to consider such evidence.

As noted above, Section 1133 requires that plan administrators afford employees a "full and fair review" of benefits claims. The implementing regulations more specifically require, *inter alia*, (1) an explanation of the reasons supporting a denial of benefits, including a list of any necessary additional material; (2) an opportunity to submit a range of documentary evidence on appeal to the plan administrator; and (3) a "review that takes into account all comments, documents, records, and other information submitted by the claimant." 29 C.F.R. § 2560.503-1(f)(3), (h)(2); *see also id.* § 2560.503-1(a), (e)-(g) (1998) (amended).

Jewell suggests that these procedures are insufficient because they do not provide for "an evidentiary hearing or discovery proceedings." Pet. at 17; *see also id.* at 20. But to the extent that the procedures do not operate fairly in any particular case, the Tenth Circuit's rule gives the district court discretion to consider new evidence. Pet. App. at 8a. This alleviates any due process concerns that might otherwise arise.[6] *See Raddatz*, 447 U.S. at 680-81

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[6] For the same reason, Jewell's suggestion that plenary proceedings are required by *Firestone*'s statement that ERISA was intended to preserve pre-ERISA common-law protections, Pet. 14, is off the mark. Regardless of whether Jewell could have received a full trial pre-ERISA, there is no question that

(rejecting due process challenge to review scheme, in part because the reviewing court has the discretion to receive additional evidence as part of its de novo review).

Moreover, Jewell's attack proves too much, as his argument, if accepted, suggests that *Firestone* was wrongly decided. *Firestone* held that the standard of review varies according to plan terms: an employer can obtain the arbitrary and capricious standard by conferring discretionary authority on the plan administrator. 489 U.S. at 112, 115. Given that the standard of review may often be outcome-determinative, the Court's willingness to countenance such differing standards indicates its confidence that all employees will have an adequate opportunity to present their evidence at the administrative stage. *See id.* at 113.

In addition, the arbitrariness review contemplated by *Firestone* is, by its nature, performed purely on the administrator's existing record. *See, e.g., Liston v. UNUM Corp. Officer Severance Plan*, 330 F.3d 19, 23-24 (1st Cir. 2003) (a closed record "is almost inherent in the idea of reviewing agency or other administrative action for reasonableness"). Since *Firestone* itself anticipates that courts will review some benefits determinations on a closed record, it is hard to see how due process could require that plaintiffs in de novo actions be permitted to supplement the administrative record as of right. *See also, e.g., Sandoval v. Aetna Life &*

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the current framework affords claimants fully adequate evidentiary opportunities.

Cas. Ins. Co., 967 F.2d 377, 380-31 (10th Cir. 1992); *Perry*, 900 F.2d at 967; *Voliva v. Seafarers Pension Plan*, 858 F.2d 195, 196 (4th Cir. 1988).

The authorities on which Jewell relies do not suggest a contrary conclusion. For instance, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), *cited in* Pet. 21-22, supports denying, not granting, the petition. There, the Court remanded the case for review "based on the full administrative record that was before the Secretary." 401 U.S. at 420. As under the Tenth Circuit's decisions in *Hall* and in this case, *Volpe* accorded the district court discretion to decide whether hearing additional testimony would be necessary for "effective judicial review." *Id.*[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[7] The other authorities Jewell cites are similarly unhelpful to his cause. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), *cited in* Pet. 17-18, do not address, even implicitly, whether Section 1132(a)(1)(B) entitles claimants to a plenary proceeding, or the scope of review under that provision. *See* 473 U.S. at 148; 536 U.S. at 359. And *Ramsey v. Hercules, Inc.*, 77 F.3d 199 (7th Cir. 1996), and *Herzberger v. Standard Insurance Co.*, 205 F.3d 327 (7th Cir. 2000), *cited in* Pet. 19-20, express concerns about applying *deferential* review – concerns that are not apposite in this de novo review case.

Respectfully submitted,

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